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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 224

WILLIAM O'HARA AND SVEN TJERSLAND, PETITIONERS,

v.

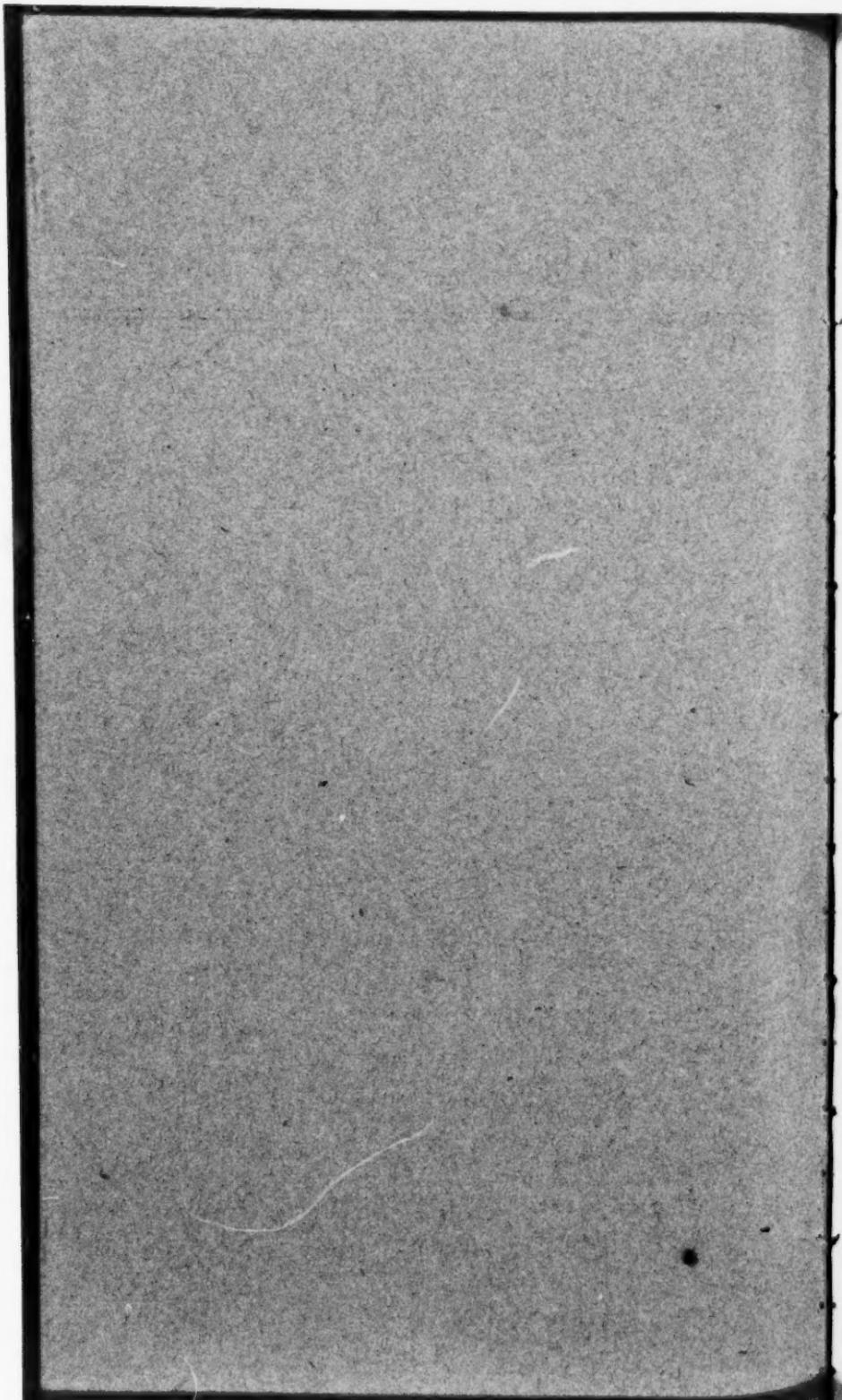
LUCKENBACH STEAMSHIP COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 12, 1954

CERTIORARI GRANTED JANUARY 12, 1955

(30,737)



(30,737)

SUPREME COURT OF THE UNITED STATES

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vs.

LUCKENBACH STEAMSHIP COMPANY

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In the Southern Division of the District Court of
the United States, in and for the Northern
District of California, Third Division.

IN ADMIRALTY.

WILLIAM O'HARA and SVEN TJERSLAND,
Libelants,
vs.

LUCKENBACH STEAMSHIP COMPANY,
Defendants.

(PRAECIPE FOR APOSTLES ON APPEAL.)

To the Clerk of the Above-entitled Court:

Please prepare as apostles on libelants' appeal in
the above cause, a record consisting of the following
papers therein:

1. The amended libel.
2. The exceptions to the amended libel.
3. The order overruling the exceptions to the
amended libel.
4. The answer to the amended libel.
5. All the testimony and other proofs adduced in
the cause.
6. The opinion of the court in said cause.
7. The final decree and notice of appeal.
8. The assignment of errors.
9. Any additional paper hereafter requested.

Yours, etc.,

H. W. HUTTON,
Proctor for Libelants.

2 *William O'Hara and Sven Tjersland*

Copy received this 15th day of January, 1924.
ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Defendant.

[Endorsed]: Filed Jan. 15, 1924. Walter B.
Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[1*]

[Title of Court and Cause.]

**STATEMENT OF CLERK U. S. DISTRICT
COURT.**

PARTIES.

Libelants: WILLIAM O'HARA and SVEN
TJERSLAND.

Respondent: LUCKENBACH STEAMSHIP
COMPANY, a Corporation.

PROCTORS.

For Libelants and Appellants: H. W. HUTTON,
Esq., San Francisco, Calif.

For Respondent and Appellee: ANDROS &
HENGSTLER, San Francisco, Calif. [2]

PROCEEDINGS.

1922.

November 17. Filed libel for seamen's wages.
Issued citation directed to Respondent,
which was filed on return
on November 23, 1922, with the

*Page-number appearing at foot of page of original certified Apostles
of Appeal.

following return endorsed thereon:

"I have served this writ personally, by copy on Zach George, Ass't Manager, Luckenbach Steamship Co., 201 California St., San Francisco, Calif. this 23d day of November, A. D. 1922.

J. B. HOLOHAN,
U. S. Marshal.

By John E. Enright,
Deputy Marshal."

1923.

24. Filed exceptions to libel.

February 5. The exceptions to libel were confessed and libelants granted five days to amend their libel.

10. Filed amended libel.

15. Filed exceptions to amended libel.

April 2. This cause came on for hearing on the exceptions to amended libel before the Honorable John S. Partridge, District Judge, and was ordered submitted.

5. The Court ordered the exceptions to amended libel overruled.

16. Filed answer to amended libel.

December 5. This cause came on for hearing, before the Honorable Frank H. Rudkin, Judge. Argued and submitted.

- 4 *William O'Hara and Sven Tjersland*
- Filed deposition of E. H. Head.
22. Ordered libel dismissed. Filed opinion.
- 1924.
- January 7. Filed final decree.
15. Filed notice of appeal.
- Filed assignment of errors.
- February 16. Filed affidavit and order permitting libelants to prosecute appeal without payment of costs. [3]
-

[Title of Court and Cause.]

(AMENDED LIBEL.)

To the Honorable M. T. DOOLING, Judge of the
Above-entitled Court.

The amended libel of William O'Hara and Sven Tjersland, *nor* of said district, filed by leave of the Court first had and obtained, against Luckenbach Steamship Company, a corporation, shipowner and ship operator, in a cause of wages civil and maritime, alleges as follows:

I.

That on all of the dates and times herein mentioned, defendant Luckenbach Steamship Company, was and now is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, and on all of said dates and times it was the owner and operator of a certain vessel flying the flag of and engaged in the merchant service

of the United States of America, named the "Lewis Luckenbach."

II.

That at the times hereinafter mentioned the said vessel "Lewis Luckenbach" was of more than one hundred tons gross burden and at said times made a voyage by sea from the port of New York in the State of New York to the port of San Francisco in the State of California, and said vessel during said times was not either a fishing or whaling vessel or a yacht, but on the contrary carried merchandise consigned to and shipped by private parties from said port of New York [4] to said port of San Francisco and said voyage was via way ports.

III.

That on the 30th day of September, 1922, at said port of New York libelants were each hired by the defendant to serve as seamen on said vessel "Lewis Luckenbach" on a voyage from said port of New York to Pacific ports of the United States and return to some port north of Cape Hatteras on the Atlantic Coast of the United States for final discharge, at the wages of \$45.00 per month, and in pursuance of such hiring libelants each signed shipping articles for said voyage before the United States Shipping Commissioner for the port of New York, and proceeded on board of said vessel on said voyage hereinbefore mentioned voyage from said port of New York to said port of San Francisco being a part of the voyage for which libelants so signed shipping articles.

IV.

That each of the libelants were sailors on said vessel and there were eight other sailors on her on said voyage from said port of New York to said San Francisco.

V.

That said vessel called at the port of San Pedro in the State of California on her said voyage from said port of New York to said port of San Francisco, and that on said voyage from said port of New York to said San Pedro, which was by sea, the said ten sailors on said vessel were not equally divided into watches while at sea for the performance of ordinary work incident to the sailing and management of said vessel, on the contrary eight of such sailors were on one watch, and one on each of the other two watches, and neither the whole nor any part of the crew of said vessel during said times were needed for either the maneuvering of said vessel or the performance of work necessary for the safety of the cargo of said vessel or said vessel, or for the saving of [5] life aboard other vessels or for the performance of fire, life-boat or other drills, but on the contrary the whole of said sailors during said voyage were engaged in ordinary work incident to the sailing and management of said vessel.

VI.

That by reason of such failure to so divide the sailors on said vessel on said voyage in equal watches libelants each on the 15th day of November,

1922, demanded his discharge from said vessel of her master and the payment of the balance of wages then standing to the credit of each of said libelants respectively which said discharge was refused by both said master and said defendant upon whom demand as aforesaid was likewise made, whereupon libelants each left the service of said vessel.

VII.

That at said time libelant William O'Hara had earned the sum of \$70.50 while in the service of said vessel on account of which he had received the sum of \$43.00, but neither the whole nor any part of the remaining sum of \$27.50 has been paid, and libelant Sven Tjersland had earned the sum of \$69.00 on account of which he had received the sum of \$40.00, but neither the whole nor any part of the remaining sum of \$28.50 has been paid.

VIII.

That it was dangerous to operate the said "Lewis Luckenbach" as she was operated with but one sailor on a watch for two of the watches the same being of daily occurrence during said passage from said New York to said San Francisco, for the reason that at times it left said vessel with no lookout, the exact hours of which varied on each watch, and it is impossible to exactly define the particular hours when she had no lookout excepting that there was a period on each of the watches on which there was but one sailor on the whole passage from said New York to said San Pedro [6] when said

vessel was without a lookout by reason of the premised aforesaid.

IX.

That each of the libelants claim to be entitled to two days' pay for each of the days that have elapsed from the 15th day of November, 1922, to the date hereof and until their said balance of wages are paid by reason of the failure to pay said balance of wages when demanded as aforesaid.

X.

That all and singular the premised are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelants pray for judgment against said defendant for the balance of wages aforesaid and two days' pay for each of the days the same are not paid from the time when they should have been paid to when they are paid, and such other and further relief as the court is competent to give in the premises.

H. W. HUTTON,
Proctor for Libellant.

[Duly verified.] [7]

Copy received this 10th day of February, 1923.

ANDROS & HENGSTLER,
Proctors for Defendant.

[Endorsed]: Filed Feb. 10, 1923. W. B. Maling,
Clerk. C. W. Calbreath, Deputy Clerk. [8]

[Title of Court and Cause.]

EXCEPTIONS TO AMENDED LIBEL.

To the Honorable, the Judges of the United States District Court, for the Northern District of California:

The exceptions of Luckenbach Steamship Company, Inc., defendant above named, to the amended libel herein, allege:

First. That said amended libel is insufficient in that it does not state facts sufficient to constitute a cause of amended libel against said defendant. It affirmatively appears from said amended libel that the crew was divided into at least two watches, as provided by Section 2, of the Act of March 4th, 1915. There is no requirement in said act for any specified number or proportion of the crew in each, or any, watch.

Second. That said amended libel does not state facts sufficient to constitute a legal excuse or justification for said libelants, or either of them, leaving said vessel prior to the termination of said voyage.

Third. It affirmatively appears from said amended libel that said libelants and each of them have forfeited all wages which may have been due at the times said libelants left the steamship "Lewis Luckenbach." [9]

WHEREFORE, said defendant prays that said libelants take nothing in this cause, that said amended libel may be dismissed and that defendant may recover its costs herein.

ANDROS & HENGSTLER,
Proctors for Defendant.

10 *William O'Hara and Sven Tjersland*

[Endorsed]: Due service and receipt of a copy of the within exceptions is hereby admitted this 15th day of Feb. 1923.

H. W. HUTTON,
Proctor for Libelant.

Filed Feb. 15, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

At a stated term of the Southern Division of the United States District Court, for the Northern District of California, held at the court-room thereof, in the city and county of San Francisco, State of California, on Thursday, the fifth day of April, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable JOHN S. PARTRIDGE, Judge.

No. 17,709.

WILLIAM O'HARA et al.

vs.

LUCKENBACH STEAMSHIP COMPANY.

MINUTES OF COURT—APRIL 5, 1923—ORDER OVERRULING EXCEPTIONS TO AMENDED LIBEL.

Pursuant to oral opinion this day rendered, it is ordered that the exceptions to the amended libel, heretofore submitted, be and the same are hereby overruled with ten (10) days to respondent to answer. [11]

[Title of Court and Cause.]

ANSWER TO AMENDED LIBEL.

To the Honorable, the Judges of the United States District Court, in and for the Northern District of California:

The answer of Luckenbach Steamship Company, Inc., a corporation, to the amended libel herein, respectfully admits, denies and alleges as follows:

I.

Defendant admits the allegations of paragraph I of said amended libel.

II.

Defendant admits the allegations of paragraph II of said amended libel.

III.

Defendant admits the allegations of paragraph III of said amended libel.

IV.

Defendant admits the allegations of paragraph IV of said amended libel.

V.

Answering unto the allegations of paragraph V of said [12] libel, defendant admits that said vessel called at the port of San Pedro during said voyage; admits that on said voyage said ten sailors were not equally divided into watches, while at sea for the performance of ordinary or other work. In this connection defendant alleges that on said voyage said sailors were divided into three watches,

and that at no time during said watch were the libelants, or either of them, required to work or to be on duty more often than one watch out of three, and that it was a physical impossibility to have divided said ten sailors equally into three watches.

VI.

Answering unto the allegations of paragraph VI of said amended libel, defendant denies that the libelants, or either of them, on the 15th day of November, 1922, by reason of the alleged failure to divide the sailors on said vessel on said voyage into equal watches, or for any other reason, demanded their discharge, or either of their discharges from said vessel, or from the master thereof; denies that on said, or any day, for said alleged, or any reasons, libelants, or either of them, demanded payment of the balance of wages then due; denies that said discharge was refused by the master of said vessel; admits that said libelants left the service of said vessel.

In this connection defendant alleges, that on or about said date, the libelants wrongfully, and without cause, deserted the said vessel at the port of San Francisco.

VII.

Answering unto the allegations of paragraph VII of said amended libel, defendant admits that the libelants have received the amounts alleged in said paragraph; admits that neither of said libelants have been paid any additional sums; and in this connection [13] alleges that the balance due

said libelants at the port of San Francisco were forfeited by them by reason of this wrongful desertion from the said vessel, as hereinbefore set forth, and that there has not been at any time since said desertion, and is not now, any balance, or sum, or sums whatsoever due to said libelants, or either of them, from defendant.

VIII.

Answering unto the allegations of paragraph VIII of said amended libel, defendant denies that it was dangerous to operate the steamship "Lewis Luckenbach" as she was operated during said voyage; denies that said vessel was operated at any time during said voyage in a dangerous manner; denies that said vessel was operated at any time during said voyage, without a lookout.

In this connection defendant alleges that at all times during said voyage said vessel was navigated in a careful maner, with due regard to all laws, rules and regulations for the navigation of vessels at sea, and for the preventing of collisions.

IX.

Answering unto the allegations of paragraph IX of said amended libel, defendant denies that the libelants, or either of them, are entitled to two days' pay for one, or any other amount of pay, from the 15th day of November, 1922, or any other date, or at all.

X.

Answering unto the allegations in paragraph X of said amended libel, defendant denies that all and singular the premises are true, but admits that

they are within the jurisdiction of the United States and of this Honorable Court.

And for a further and first affirmative defense to said amended libel, defendant alleges: [14]

I.

That at all times in said amended libel mentioned, defendant was, and now is, operating a number of vessels, including the steamship "Lewis Luckenbach" in the intercoastal trade, between Atlantic Coast ports and Pacific Coast ports, via the Panama Canal.

II.

That during all of said times, it was, and now is, the practice of defendant to sign on crews for its vessels, including said steamship "Lewis Luckenbach," at the port of New York, or at other Atlantic Coast ports for round voyages to the Pacific Coast ports and return for discharge at an Atlantic Coast port north of Cape Hatteras.

III.

That during all of said time the prevailing wage for seamen, at said Atlantic Coast ports was, and is, the sum of \$45.00 per month, or thereabouts. That all of the seamen signed on defendant's vessels at said Atlantic Coast ports, including the libelants, were signed on at said prevailing wage.

IV.

That at all of said times the prevailing wage for seamen on the Pacific Coast was, and is, much higher than on the Atlantic Coast, being \$70.00, or thereabouts, in the coastwise lumber trade.

That as a result of said difference in wages the crews of defendant's ships, including the libelants herein, with the exception of the quartermasters and petty officers, have, during all of said times, always deserted from defendant's vessels, when said vessels reached the ports on the Pacific Coast.

V.

That the wholesale desertion by the crews of defendant's vessels at Pacific Coast ports, including the desertion by the [15] libelants herein, delayed the sailing of said vessels, and thereby caused defendant a large amount of expense and trouble in the hiring of new crews.

VI.

That the libelants herein, together with the other members of the crew of said steamship "Lewis Luckenbach," deserted from said vessel, because of the higher wages offered on the Pacific Coast, as hereinbefore set forth, and not because of any failure on the part of defendant, or of said vessel, to divide the watches on said vessel, or to keep a proper lookout on said vessel during said voyage.

And for a further and second affirmative defense to said amended libel, defendant alleges:

I.

That defendant is not required by the provisions of Section 2 of the Act of March 4, 1915, or by any other law to divide the watches on board its vessels so that there is an equal number of men in each watch.

II.

That defendant is not required by the provisions of said Act or by any other Act, to rotate the duties of the crew so that each member of the crew shall participate in the performance of all of the work on board. On the contrary, the master and officers of the vessel are obliged, for the safe and efficient navigation of said vessel, to designate the men from the crew who are best fitted to perform the respective duties required of them.

III.

That to require the defendant to divide the crew of said vessels equally, as contended by libelants, would seriously [16] hamper and interfere with the safe and efficient navigation of defendant's vessels, including said steamship "Lewis Luckenbach."

IV.

That to require the defendant to divide the crew of said vessel equally, as contended by libelants, would result in certain members of the crew being taken from watches where they had certain duties to perform, and placed in watches with no duty to perform.

WHEREFORE, defendant prays that the libelants take nothing by their amended libel, and that the same may be dismissed, and that defendant may recover its costs herein.

ANDROS & HENGSTLER,
Proctors for Defendant.

[Duly verified.] [17]

vs. Luckenbach Steamship Company. 17

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 16th day of April, 1923.

H. W. HUTTON,
Proctor for Libelant.

Filed Apr. 16, 1923. Walter B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [18]

At a stated term of the Southern Division of the United States District Court, for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Wednesday, the fifth day of December, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable FRANK H. RUDKIN, Judge.

No. 17,709.

WILLIAM O'HARA and SVEN TJERSLAND
vs.

LUCKENBACH STEAMSHIP COMPANY.

MINUTES OF COURT—DECEMBER 5, 1923—
HEARING.

This suit came on regularly this day for hearing. H. W. Hutton, Esq., appearing as proctor for libelants and F. W. Dorr, Esq., appearing as proctor for respondent. Sven Tjersland was duly sworn and testified on behalf of libelants, and libelants

rested. Respondent introduced and read in evidence the deposition of E. H. Read. George Davis was sworn and testified on behalf of respondent, and respondent rested. The evidence was thereupon closed. After arguments by the proctors for the respective parties, it was ordered that this suit be and the same is hereby submitted upon briefs to be filed in 5 days. [19]

[Title of Court and Cause.]

(TESTIMONY TAKEN IN OPEN COURT.)

Tuesday, December 4, 1923.

Counsel Appearing:

For the Libelant: H. W. HUTTON, Esq.

For the Respondent: ANDROS & HENGSTLER, Represented by F. W. DORR, Esq.

Mr. HUTTON.—This is an action for seaman's wages. The defendant claims a forfeiture by reason of alleged desertion. The amount demanded by O'Hara is \$27.50. That is not disputed. The amount demanded by Tjursland is \$28.50. That is not disputed. There do not seem to be any disputed facts. We are here to vindicate one of the laws of Congress.

The COURT.—What is the defense?

Mr. HUTTON.—The defense is desertion. The facts are these: These two men shipped as seamen on one of the Luckenbach vessels named in the libel at New York for a voyage to the West Coast and return. When they arrived in San Francisco

they demanded of the master that they be paid off for this reason: There is a law of Congress that requires the sailors on a ship shall [20] be divided into at least two watches. On this particular vessel, for the purpose of cleanliness, they divided three of the sailors into three watches and the others were kept in one watch. The law of Congress says that unless that law is obeyed a sailor has a right to demand his discharge at any time, which these men did. I do not think there is any dispute about that. On arrival here we claimed a discharge because there were ten sailors on the ship and they had three four hours on and eight ours off, and the other seven were on one watch.

The COURT.—If they were discharged here, what is your claim for wages?

Mr. HUTTON.—We demanded a discharge and that was refused, by reason of the failure to obey this law. The purpose of the law is to preserve safety so that in case of disaster there will be somebody on deck. We will show by one witness that during a period of the night, and during a period of all the times, in fact, there was a half hour in every four watches when there was no lookout on the ship.

Mr. DORR.—The amount involved is very small, but the point is very important to steamship companies. Our defense is that the law requires us not to divide the crew into equal watches, but that the provision of the law is that no man shall stand no more than one watch out of two. In this case there was one watch in three, that no man worked

more than eight hours out of twenty-four. That by reason of the difference in the prevailing wages on the Atlantic and the Pacific, the crews of the ships uniformly deserted when they reached a Pacific port. And that in this case they first demanded their unconditional discharge without any excuse, and then they demanded a certificate to go to the Marine Hospital on account of sickness, which was given [21] them, and they returned from the Marine Hospital, not being admitted, and then subsequently they demanded their discharge on this ground. That is substantially our defense. I might state that the question which is raised under this section of the statute is a new one.

The COURT.—The question depends entirely, then, on the construction of the statute?

Mr. DORR.—Absolutely. It was raised in this case by exceptions, but Judge Partridge did not pass upon that question. He said it would be reserved until the trial.

Mr. HUTTON.—The law says that these men shall be on watch successively. Of course, if a man is on watch eight hours and off sixteen, he is not successive to anybody.

The COURT.—You agree on the facts, do you?

Mr. DORR.—Not as far as the ship being operated without a lookout, or that it was dangerous. We have the deposition of the captain on that point.

Mr. HUTTON.—The deposition of the captain says that the vessel was safe. Our contention is

that your Honor cannot consider that, because he cannot set his judgment up against the law of Congress.

TESTIMONY OF SWEN TJURSLAND, FOR LIBELANT.

SWEN TJURSLAND, called for the libelant.

Mr. HUTTON.—Q. You are one of the libelants in this action, that is, one of the men trying to get your wages? A. Yes.

Q. You were on the "Louis Luckenbach," were you not?

A. Yes. I demanded my discharge because of the watches.

Q. You were on the "Louis Luckenbach"?

A. Yes.

Q. You joined in New York and came around to San Francisco? A. Yes. [22]

Q. On the way out how were the men divided up?

A. They were divided into three watches, two men on each watch.

Q. What two men?

A. One quartermaster and one able seaman on each watch.

Q. How many sailors were there?

A. There were ten sailors.

Q. How many quartermasters? A. Three.

Q. That would be thirteen. You say they were divided up two on each watch? A. Yes.

Q. What two men were on each watch?

A. One quartermaster and one able seaman on each watch.

22 *William O'Hara and Sven Tjersland*

(Testimony of Swen Tjersland.)

Q. What became of the other seven men?

A. They were working day work, eight hours a day.

Q. Between what hours?

A. From eight o'clock in the morning until five at night.

Q. What were you?

A. I was a quartermaster.

Q. How long did you have to stay at the wheel?

A. I stayed three and one-half hours.

Q. Was there any break in that?

A. Yes, I had the wheel for two hours and then I go aft and I had relief.

Q. At night-time, who relieved you?

A. The man on the lookout.

Q. Was it the same way in the daytime?

A. Yes; any man who was working on deck in the daytime relieved me in the daytime.

Q. At night-time the man on the lookout relieved you? A. Yes.

Q. For how long? A. For half an hour.

Q. Was that the way the quartermaster was relieved all the way out, at night-time?

A. Yes; after twenty-four hours out from New York they started that—out from Philadelphia.

Q. How long did that keep up?

A. Until we got to San Pedro.

Q. When the lookout went to the wheel, and relieved the quartermaster, was there any lookout?

A. No, sir, no lookout. [23]

Q. How often did that happen?

(Testimony of Swen Tjursland.)

A. It happened from 10:00 to 10:30 at night, and from 2:00 to 2:30 in the morning—one hour every night.

Q. Where would the quartermaster go when he was relieved?

A. He was told to go down anywhere, down in his room and take a smoke.

Q. How many men did that leave on deck?

A. It leaves only one officer and the man at the wheel.

Q. Where were the rest of the men?

A. They were asleep.

Q. When you got to San Francisco, what did you say to the master?

A. I asked him to get paid off.

Q. How many times did you ask him?

A. About twice or three times.

Q. Was O'Hara with you at the time? A. Yes.

Q. He was on the ship, wasn't he? A. Yes.

Q. What did you say to the Captain when you went to get paid off?

A. I asked him to get paid off because the watches were not satisfactory.

Q. Did you take him any paper, any letter?

A. Yes.

Q. From whom? A. From Mr. Hutton.

Q. Did he pay you off then? A. No, sir.

Q. How many times did you ask him to get paid off? A. I believe about three times.

Q. And he never would pay you off?

A. No, sir.

(Testimony of Swen Tjersland.)

Q. So you quit? A. Yes, sir.

Q. And O'Hara quit, too? A. Yes, sir.

Q. Was he with you at all the times you asked to be paid off?

A. Not the first time, no.

Q. How many times was he with you when you asked the captain to pay you off?

A. Twiee. [24]

Q. Did you ever go down to the company's office and ask to be paid off? A. Yes, sir.

Q. They didn't pay you off? A. No, sir.

Cross-examination.

Mr. DORR.—Q. In your quartermaster's watch, you were on for four hours, during which you actually stood watch for three and a half hours: Is that correct? A. Yes, sir.

Q. And then you were off watch eight hours?

A. Yes, sir.

Q. There were two other quartermasters?

A. I had to work one hour on my watch below, because I had half an hour off on each watch.

Q. There were two other quartermasters who rotated with you? A. Yes, sir.

Q. And then after being off eight hours, you came on again? A. Yes, sir.

Q. And stood three and a half hours out of your four hours?

A. Yes, but for that half hour that I was off I had to work on my watch below, so that I only had seven hours off.

(Testimony of Swen Tjursland.)

Q. In any event, when you were on watch, you only stood three and a half out of your four hours?

A. Yes, sir.

Q. And you stood a watch in three; that is correct, is it not—and two other quartermasters?

A. Yes.

Q. What was your objection to the watch?

A. That there was no man on the lookout while we were down below. There should be three men on watch.

Q. When did you find that out—when you got ashore?

A. I found it out twenty-four hours after we left Philadelphia.

Q. Didn't you first demand your discharge when you reached San Francisco upon other grounds?

A. Yes; I don't know as it was first. I was sick at the time— [25]

Mr. HUTTON.—Wait a moment. I don't think that is material. He might have had three or four reasons but that would make no difference if he had one reason that was legal.

The COURT.—I will let it go in for the purpose of making up the record.

Mr. DORR.—Just read the question to the witness.

(Question read by the reporter.)

A. Yes, I believe I did. I was sick at the time.

Q. O'Hara was not a quartermaster, was he?

A. Yes.

Q. He was also a quartermaster?

(Testimony of Swen Tjursland.)

A. Yes, on another watch.

Q. On another watch? A. Yes.

Q. And there was still a third quartermaster?

A. Yes.

Redirect Examination.

Mr. HUTTON.—Q. You say that the half hour that you got off for the relief, you had to put that in during the eight hours off? A. Yes.

Q. Was that every day? A. Every day.

Q. What kind of work did you do then?

A. Clean up the wheel-house, shine bars, wash the paint, clean the floor—the deck of the wheel-house.

Mr. HUTTON.—That is all. That is our case.

Mr. DORR.—If the Court please, in behalf of the respondent, the Luckenbach Steamship Company, I wish to offer in evidence the deposition of Captain E. H. Reed, of the steamship "Luckenbach." The deposition has just been filed.

Mr. HUTTON.—It was taken subject to legal objections. The captain gives his opinion as to the safety of the vessel operated as she was. Our contention is that he cannot set his judgment up against the laws of the United States. [26]

The COURT.—The deposition will be considered read.

TESTIMONY OF GEORGE DAVIDSON, FOR
RESPONDENT.

GEORGE DAVIDSON, called for respondent,
sworn.

Mr. DORR. Q. What is your position, Mr.
Davidson? A. Superintendent.

Q. Of what?

A. The Luckenbach Steamship Company.

Q. Port superintendent? A. Yes.

Q. Were you so acting during the year 1922?

A. Yes.

Q. Are you familiar with the conditions existing
in the San Francisco water front regarding the hir-
ing and discharging of men? A. Yes.

Q. Are you familiar with the prevailing rates of
wages as compared with the wages on Atlantic
ports? A. Yes.

Mr. HUTTON.—I object to that as immaterial.
If a man has a right to leave he has a right to leave,
irrespective of what the wages are.

Mr. DORR.—I wish to show that by reason of the
prevailing wage, the difference in the prevailing
wages, that crews uniformly deserted when they
reached San Francisco, and used all sorts of schemes
to get off the ships.

The COURT.—I doubt the competency of that.
It is what occurred in this particular case. The
others would afford very little evidence as to what
these men did. The fact that men generally broke

(Testimony of George Davidson.)

their contract is no evidence that a particular individual did.

Mr. DORR.—But the difference in wages existed at this time—

The COURT.—It might show an inducement to a man to break his contract, but it would not tend to show that he did break it.

Mr. HUTTON.—The only excuse for that would be that these [27] gentlemen ought to pay the same wages in New York as they do on this side. The captain says he always filled up again, so what difference does it make?

The COURT.—You can put it in for the purpose of making up your record.

Mr. DORR.—Q. Was there any difference between the Atlantic and the Pacific Coast rates of wages? A. Yes.

Q. What was the difference?

A. On the East Coast \$45, and on the West Coast between \$70 and \$90.

Q. What sort of work on the West Coast?

A. Lumber trade, steam schooners.

Q. What effect did that have on your crews reaching San Francisco?

Mr. HUTTON.—That is objected to as too general, and as immaterial.

The COURT.—I will admit it for the purpose of making up the record. I agree with you.

A. Mostly all sailors quit.

Mr. DORR.—Q. Did you have charge of supplying your ships with crews? A. The sailors, yes.

(Testimony of George Davidson.)

Mr. DORR.—I think I will not pursue that line any further. That is all.

Cross-examination.

Mr. HUTTON.—Q. What are the wages paid on the East Coast now? A. \$55.

Q. What are the wages on this side?

A. I think \$75.00.

Q. So they have gone up \$10 over there and \$5 over here?

A. They went up \$10 over there, I don't know what they went here.

Mr. DORR.—That is our case.

The COURT.—Just file a reference to your authorities, Mr. Hutton. You may file one, Mr. Dorr. Do it within two or three days—say five days. [28]

[Endorsed]: Filed Jan. 15, 1924. Walter B. Maling, Clerk. C. W. Calbreath, Deputy Clerk.
[29]

[Title of Court and Cause.]

(DEPOSITION OF E. H. READ, TAKEN ON BEHALF OF RESPONDENT.)

BE IT REMEMBERED: That on Thursday, November 22, 1923, pursuant to stipulation of counsel hereunto annexed, at the offices of Messrs. Andros & Hengstler, in the Kohl Building, in the city and county of San Francisco, State of California, personally appeared before me, Francis

Krull, a United States Commissioner for the Northern District of California, authorized to take acknowledgements of bail and affidavits, etc., E. H. Read, a witness called on behalf of the respondent.

H. W. Hutton, Esq., appeared as proctor for the libelants, and F. W. Dorr, Esquire, appeared as proctor for the respondent, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did hereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken *de bene esse* on behalf of the respondent at the offices of Messrs. Andros & Hengstler, in the Kohl Building, in the city and county of San Francisco, State of California, on Thursday, November 22, 1923, before Francis Krull, a United States Commissioner for the Northern District [30] of California, and in shorthand by J. E. Boys.

(It is further stipulated that the deposition, when written up, may be read in evidence by either party on the trial or the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties.

(It is further stipulated that the reading over

(Deposition of E. H. Read.)

of the testimony to the witness and the signing thereof are hereby expressly waived.) [31]

E. H. READ, being called as a witness on behalf of the respondent, was first duly sworn by the Commissioner, to testify the truth, the whole truth and nothing but the truth, and did testify as follows:

Direct Examination by Mr. DORR.

Q. What is your name, Captain?

A. E. H. Read.

Mr. DORR.—The usual admiralty stipulation, Mr. Hutton?

Mr. HUTTON.—Yes.

Mr. DORR.—Q. You are the master of the steamship "Louis Luckenbach"? A. Yes, sir.

Q. How long have you been employed by the Luckenbach Steamship Company as master?

A. It will be 14 years the coming next February.

Q. Was the "Louis Luckenbach" on this coast on or about the 15th of November, 1922?

A. Yes, sir; she was,—about that time.

Q. The "Louis Luckenbach" was in the port of San Francisco at that time. A. Yes, sir.

Q. Are you familiar with the circumstances under which the libelants, William D. O'Hara and Sven Tjersland, left the employ of the steamship "Louis Luckenbach"? A. Yes, sir.

Q. Will you just state the circumstances?

A. On arrival here they asked to be paid off, and I refused to pay them off, because they had signed articles on for the round voyage,—signed on

(Deposition of E. H. Read.)

articles for the round voyage. Then they wanted,—I won't be positive whether both of them or one of them,—but I am positive one of them wanted a hospital certificate; and I gave it to him, or it was given to them. The officer gave it to them. After that they came back to the ship and demanded to be paid off, claiming I had violated a law of [32] 1915. Instead of looking the law up, I asked them what law it was; and they said "The law said I must put them in—divide my crew of sailors watch and watch"; and I said, "All right; I would not pay them off." One of them,—I don't know which one,—made the remark that, "The shipping commissioner will send for you." I said, "All right; I am right here." They went ashore again and came back later, with a letter to me. I am not sure that the letter was addressed to me, or to our office here, because the men had been to the office first, and the office had sent them to me with it. But the letter was from a lawyer, saying something to the effect that these men were entitled to their discharge; that I had violated the Rule of Section—naming the section—of the Law of 1915. I told them I would not pay them off; and that is the last I saw of them.

Q. Captain, where did these men sign on?

A. New York.

Q. And for what voyage did they sign on?

A. Signed for the voyage to Pacific Coast ports and back to the Atlantic Coast.

Q. North of Hatteras?

(Deposition of E. H. Read.)

A. I am not sure whether it stated "Back to New York," or "North of Hatteras"; but it was to the other coast.

Q. It was for the round voyage? A. Yes, sir.

Q. Do you remember the rates of their wages?

A. \$40, I am pretty sure.

Q. \$40 per month?

A. Per month; I think \$40, for AB's and \$30 for ordinary, at that time, we were paying.

Q. These men were AB's? A. I think so.

Q. Captain, during the voyage was any complaint made to you in regard to the standing of watches?

A. No, sir; no complaints whatever. [33]

Q. Was any complaint made to you about standing lookout watches, or failure to keep lookout watches? A. No, sir; there was not.

Q. Was there any time on that voyage, to your knowledge, when the lookout watch was not kept posted?

A. To my knowledge there was no time, from sunset to sunrise, when there wasn't a lookout kept on that ship.

Q. Do you know what rate of wages were being paid to sailors on the Pacific Coast at that time?

A. I only know from hearsay: They were paying \$70 to \$75 on the steam schooners and some of the oil tankers, and were paying a bonus to the men if they stayed for six months. I only know that from hearsay.

Q. Did you have any trouble in holding your crew?

(Deposition of E. H. Read.)

A. I never could hold them. They always, more or less of them, every trip, all the time, as soon as we got out here, wanted to be paid off. They came out as passengers, to get their passage out. If they could not get paid off,—if they could not get a certificate from a doctor of being incapacitated for duty, they drew half of the money they had coming to them and would quit,—leave. They had been doing that right along.

Q. I understand. And when these men demanded that they be paid off, claiming you had violated the law, they had previously demanded that they be paid off, without any excuse whatsoever?

A. Yes, sir; they asked to be paid off first thing of all; and I told them I would not pay them off. I am not positive whether both of them, but I am positive one of them wanted a certificate for the doctor,—wanted to see a doctor; and I think the both of them did.

Q. Did you give them the doctor's certificate?

A. They got the regular United States form of hospital certificate from the master. [34]

Q. And that permitted them to visit the Marine Hospital?

A. Yes, sir; the Marine Hospital doctor.

Q. And if anything had been the matter with them they would have been treated by the doctor there; would they?

A. Yes, sir; or if incapacitated from duty, the

(Deposition of E. H. Read.)

doctor always gives them a certificate back to the master of the ship that they are not fit for duty.

Q. After that, did either of them obtain such a certificate?

A. I don't know. They never brought it to me if they did.

Q. They never afterward asked their discharge on that ground?

A. No. The next ground was that I had violated this rule; and then they went to the Shipping Commissioner evidently; or threatened me with the Shipping Commissioner,—that he would send for me; but he did not. I don't know whether they went to him or not. If they did, he probably turned them down; and the next they came to was a letter from Mr. Hutton, I think; the letter was signed by Mr. Hutton, I think; I am not sure; but it was from a lawyer anyway.

Q. What sort of watches did these men stand on this voyage; how many hours on and how many hours off?

A. There was never any on more than 8 hours at a time; 8 hours a day. I don't know whether these men were in the day gang or in the watch—the watch gang. I stand watches on my ship, every man four on and four off—four on and eight off.

Q. Four off?

A. Four on and eight off; and the balance of the sailors, day men, from eight o'clock in the morning until five with one hour off for dinner.

(Deposition of E. H. Read.)

Q. How many hours out of the 24 do the day men stand? A. Eight. [35]

Q. Did any of your deck force stand more than 8 hours out of the 24?

A. No; unless in an emergency,—when you turn out all hands for something.

Q. I mean for ordinary ship's work?

A. No, sir.

Q. Did any of the men on this voyage stand more than one watch out of three?

A. I don't think they did. I don't remember whether all hands were called out for anything on that voyage or not.

Q. Outside of an emergency they didn't?

A. Outside of an emergency they did not.

Q. Captain, it is claimed in this case, that it is your duty under the law to divide your deck force equally into three watches, and to rotate the men successively among the various duties to be performed. How many men did you have in your deck force?

A. I had four mates—four officers; three quartermasters, bosun, and carpenter.

Q. And how many sailors?

A. Ten sailors; six AB's and four ordinaries.

Q. Aside from your officers and petty officers, your deck force would consist of ten men?

A. Ten men.

Q. If you were to divide your watch,—your deck force, rather,—into three equal watches, state what

(Deposition of E. H. Read.)

effect it would have upon the work to be done on board the ship?

A. You could not divide ten men into three equal watches.

Q. Assuming you could divide them as nearly into three equal watches as possible, what would be the result; what would be the effect on the work upon the ship?

A. We would have men on watch in the night-time who would not be doing anything. They would be standing four on and eight off anyhow; and of the four that would be on in the night-time some would not be doing anything, except sleeping and sitting around. It would shorten up the working crew on the ship. [36]

Q. How many details are there on the night watches to be filled?

A. Only the lookout, for the sailors; because the steering is done—taken care of by the quartermasters.

Q. So, if you had three or more men standing night watch on deck, there would be a number of them doing nothing? A. Yes, sir.

Q. Is that a fact? A. That is a fact.

Q. And being off watch for eight hours, during that time they can also do nothing? A. Yes, sir.

Q. What effect would it have upon the work of your vessel, if you were required to rotate the men successively through the various duties to be performed?

A. Well, it would have a very bad effect, because

(Deposition of E. H. Read.)

if I could not pick out men for certain jobs, and I had to rotate them, it might make me put a color-blind man on a lookout.

Q. Who details the men to the various positions?

A. The chief officer.

Q. And is it his practice to pick out the men best qualified for the various duties?

A. He picks out the men who are to stand watch and watch, and picks out the men who are for the day men, if that is what you mean.

Q. Yes; and by "watch and watch" you are speaking of a watch in three?

A. It is the watch in three; engine-room, deck and all, is watch and watch; except the men who are picked out for day men; and their work daily—work eight hours.

Q. They have 16 hours off?

A. They have all night off; they are on from 8 o'clock in the morning until 5 o'clock at night, except an hour for dinner; unless we have to turn all hands out, to take in an awning when it starts blowing, or something like [37] that.

Q. Emergency work? A. Emergency work.

Q. I want you to state, Captain, whether or not, any time during this voyage the "Louis Luckenbach" was operated or navigated in a manner which was dangerous, or without sufficient crew to fill the details?

A. She wasn't. I consider that she was operated at no time dangerously. She made her voyage, anyhow.

(Deposition of E. H. Read.)

Mr. DORR.—That is all.

Cross-examination.

(By Mr. HUTTON.)

Q. Captain, how many men did you have on the day watch? A. On this particular voyage?

Q. Yes.

A. Seven, from Balboa to San Pedro, seven.

Q. And how were the other three assigned?

A. One on each watch, four on and eight off; no steering to do.

Q. Then, after 5 o'clock at night, who would be on duty?

A. The man who was on watch from 4 to 8; the 4 to 8 watch man.

Q. Who else beside that?

A. That is the sailor who is on duty.

Q. Who else would be on duty?

A. The quartermaster at the wheel.

Q. Where is the wheel, aft or amidships?

A. Amidships,—on the bridge of the ship. Where else would it be? Yes,—it is aft in sailing vessels; but this is a large steamer, Mr. Hutton, and the wheel is on the bridge.

Q. There would be an officer on watch—would there? A. Yes, sir; I carried four officers.

Q. Where would he be; on the bridge?

A. On the bridge.

Q. Where would the sailor be?

A. Either in the bow or in the crow's-nest, after sunset. In the crow's-nest when it is [38] bad weather. If it is so bad you cannot keep them in

(Deposition of E. H. Read.)

the bow you put them in the crow's-nest which is on the foremast which is forward;—we have no mast; it is a king-post with a mast fixed across it. In fine weather he is kept in the bow of the ship.

Q. From 5 o'clock at night until the morning, all there would be on deck on actual duty would be an officer, a quartermaster and one sailor?

A. Yes; on that trip.

Q. By that do you mean on the way from New York to San Pedro?

A. No; from Balboa to San Pedro, I understand. I could not swear to it; I have only the officer's word for it.

Q. You spoke about your crew leaving here. You always had to get an equal number for the sailing of the ship, didn't you? A. Yes, sir.

Q. Did you sign them on here to go back to New York, to get paid off there?

A. No; generally I get some here to go to Portland or Seattle; fellows who want to go up the coast; and there would possibly get some more who wanted to come down this way; and sometimes a fellow who wants to go all the way down to New York. That is the way we have been operating now, for practically ever since the war—since we started running out of here after the war.

Q. Did you call at any Mexican ports? A. No.

Q. You came straight from Balboa to San Pedro?

A. Yes, sir; and it is mostly passengers we have, mostly, going both ways; men wanting to go down

(Deposition of E. H. Read.)

to the east coast, going back, and men wanting to come to the west coast coming out.

Q. You always carried a full crew?

A. Yes, sir; I have always been operating under the law. My effort has been to be within the law.

Q. When you left Balboa for the east coast you always were sure to have full crew of men?

A. Yes, sir. [39]

Q. No matter how many had left you?

A. Yes, sir.

Q. The principal thing for a sailor to do on the ship is to keep it clean?

A. Yes; clean the iron and paint.

Q. Who does your rigging?

A. There isn't much rigging to do on a steamship.

Q. Who keeps your ropes in order?

A. The bosun and sailors do that. You don't have any sailors now to splice a piece of wire—not one out of ten.

Q. Do you do that ashore in New York?

Q. Most of it is done ashore. Our cargo falls come on board with an eye already spliced in them; and sometimes it gives way, and they will splice an eye in the cargo fall on board the ship.

Q. The mate, he don't stand any watch?

A. No, the chief mate don't stand any watch.

Q. You had four mates—first, second, third and fourth?

A. Yes, sir; we have on two of the big ships, the "Andrea" and the "Louis."

(Deposition of E. H. Read.)

Q. How big is she?

A. Fourteen thousand four hundred dead weight.

Q. How far is it from the bridge to the fo'castle?

A. The bridge is possibly about the middle of her; I don't know whether it is just the middle. The ship is 527½ feet long—over all.

Q. How wide is she? A. 68.2.

Q. She was a big ship?

A. Yes, sir; she is a big ship.

Q. When are you going out?

A. To-morrow night, I believe.

Q. You are going to leave the port?

A. Yes; bound north, I think.

Q. In other words, you are bound on a voyage for the east? [40]

A. Yes, I go to Portland and Seattle and come back here and then go to Los Angeles or San Pedro; and then back east again; I am on my regular run.

Q. How long does it take you to make a trip?

A. According to my schedule I will make it in 59 days; last time I was 2 months and eight days.

Q. It depends on the weather and your detentions? A. Yes, sir.

Q. On the cargo?

A. Yes, sir; and on the amount of the cargo.

Q. That letter you got was from me?

A. I think it was; yes, sir. I think I remember the name "Hutton."

Q. You haven't got the letter with you, have you?

vs. Luckenbach Steamship Company. 43

A. No; I have not. I don't know whether I have it filed with my papers or not.

Witness excused. [41]

[Endorsed]: Filed December 5, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[43]

At a stated term of the Southern Division of the United States District Court, for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Saturday, the twenty-second day of December, in the year of our Lord one thousand nine hundred and twenty - three. Present: The Honorable FRANK H. RUDKIN, Judge.

No. 17,709.

WILLIAM O'HARA et al.

vs.

LUCKENBACH S. S. COMPANY.

MINUTES OF COURT—DECEMBER 22, 1923—
ORDER DISMISSING LIBEL.

This suit, heretofore tried and submitted, being now fully considered, and the Court having filed its memorandum opinion, it is ordered that the libel be and the same is hereby dismissed. [44]

[Title of Court and Cause.]

MEMORANDUM OPINION (AND ORDER DISMISSING LIBEL).

RUDKIN (Circuit Judge).—The libelants shipped as seamen for a voyage from the east to the west coast of the United States and return. Upon the arrival of the vessel at San Francisco they asked to be paid off without assigning any reason therefor. This demand was refused by the master for the reason that they had signed articles for the return voyage. A hospital certificate was then demanded by one or both libelants, and the certificate or certificates were furnished. Later the libelants returned to the ship and demanded that they be paid off and discharged for the reason that the master had violated the provisions of section 2 of Act of March 4, 1915 (38 Stat. 1164). That section provides that in all merchant vessels of the United States, with certain exceptions not material here, the sailors shall, while at sea, be divided into at least two watches, and that whenever the master of any vessel shall fail to comply with this requirement the seaman shall be entitled to discharge from such vessel and to recover his pay. The libelants contend that under this section there must be an equal division of the crew into the different watches. That [45] is, if the sailors are divided into two watches, one-half must be assigned to each watch; if into three watches, one-third to each watch, and so forth, as nearly as may be. If this is the proper construction

of the act, it is conceded that the master failed to comply therewith. But, in our opinion, the primary object of the section was to fix the hours of service and to prevent overwork, not to prescribe the number of seamen on each watch. If one-half or one-third of the crew must be assigned to duty at night, it is quite apparent that a majority of those thus assigned will have little or nothing to do. Of course, if such is the requirement of the law, the courts have nothing to say, but we fail to find anything in the statute calling for that construction. If Congress intended to thus limit the discretion of the master in the management of the vessel and the disposition of the crew it would have employed direct and specific language to that end. The libelants were, therefore, not entitled to their discharge, and the libel is dismissed.

[Endorsed]: Filed Dec. 22d, 1923. Walter B. Maling, Clerk. [46]

[Title of Court and Cause.]

FINAL DECREE.

This cause having come on regularly for trial, libelants above named appearing by their proctor, H. W. Hutton, Esq., and defendant appearing by its proctors, F. W. Dorr, Esq., and Andros & Hengstler, and testimony, oral and documentary, having been taken, and the cause having been heard on the pleadings and proofs, and having been argued and submitted by the proctors for the respective parties, and due deliberation having been had,

46 *William O'Hara and Sven Tjersland*

and the Court having been fully advised in the premises, and having rendered its opinion herein with findings as therein set forth, ordering that the libel be dismissed; .

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said libelants take nothing by their said libel, and that said libel be and it is hereby dismissed, and that defendant above named do have and recover from said libelants its costs of suit, to be hereinafter taxed.

Dated January 7th, 1924.

FRANK H. RUDKIN,
United States Circuit Judge. [47]

[Endorsed]: Receipt of a copy of the within final decree is hereby received this 28th day of Dec., 1923.

H. W. HUTTON,
Per C. S. WILLEY,
Proctor for Defendant.

Entered in Vol. 15, Judg. and Decrees, at page
242.

Filed Jan. 7, 1924. Walter B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [48]

[Title of Court and Cause.]

(NOTICE OF APPEAL.)

The defendant in the above cause and its proctors will please take notice:

That libelants above named and each thereof,

hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree given and made in the above cause by said District Court on the 7th day of January, 1924, and from each and every part of such decree.

H. W. HUTTON,
Proctor for Libelant.

Copy received this 15th day of January, 1924.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Defendant.

[Endorsed]: Filed Jan. 15, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[49]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

1. The Court erred in finding and deciding that the primary object of Section 2, of the Act of Congress of date March 4th, 1914, commonly known as the Seamen's Bill, or LaFollette Act, was to fix the hours of service of seamen.
2. The Court erred in finding and deciding that the primary object of said Section 2 of said Act was to prevent overwork.
3. The Court erred in finding and deciding that the primary purpose of said Section 2 of said Act was not to prescribe the number of seamen that should be on each watch on a vessel.

4. The Court erred in concerning itself as to whether any seamen employed on vessel would have little or nothing to do at night or at any other time.

5. The Court erred in not finding and deciding that the following language in said Section 2 of said Act, "The sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water-tenders into at least three watches," compels such of sailors on a vessel into equal parts as near as they can be divided.

6. The Court erred in not finding and deciding that the intention of the Congress in passing said Section 2 of said Act, was to always have enough men on the deck of a vessel to make necessary provisions for safety in the event of a disaster. [50]

7. The Court erred in not finding and deciding that the requirement of dividing sailors into at least two watches on a vessel, is a safety requirement and for the protection of life at sea.

8. The Court erred in not finding and deciding that the language divided into at least two watches, compelled the dividing of the sailors on the "Lewis Luckenbach" into two or more equal parts.

9. The Court erred in finding that the libelants were not entitled to their discharge from the "Lewis Luckenbach" at the times mentioned in the amended libel herein, and in not finding and deciding that each was entitled to his discharge.

10. The Court erred in not ordering judgment for each of the libelants as prayed for in the amended libel herein.

11. The Court erred in dismissing libelants' libel herein, and dismissing said libel as to each of the libelants.

12. The Court erred in not finding and deciding, that, according to the general understanding of the English language, the meaning of the language divided in two or more watches, means an equal division as near as may be.

13. The Court erred in not finding and deciding that the term divide means an equal division as near as may be.

H. W. HUTTON,
Proctor for Libelants.

Copy received this 15th day of January, 1924.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Defendant.

[Endorsed]: Filed Jan. 15, 1924. Walter B.
Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[51]

[Title of Court and Cause.]

(AFFIDAVIT AND ORDER PERMITTING LI-
BELANTS TO PROSECUTE APPEAL
WITHOUT PREPAYMENT OF COSTS.)

United States of America,
Northern District of California,—ss.

H. W. Hutton, being first duly sworn, deposes
and says as follows:

I am the proctor for the libelants in the above

cause, and make this affidavit on their and each of their behalfs.

The libel herein was filed to recover seamen's wages, and there is no other demand of any kind therein.

The Act of The Congress of the United States of July 1st, 1918, United States Statutes at Large, page 40, reads:

"That courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety."

The libelants and each thereof are prosecuting the above suit for wages to an appeal and for their own benefit.

I therefore pray on their behalf that they may be allowed to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, without furnishing bonds or prepayment of or making deposit to secure fees or costs. [52]

H. W. HUTTON.

Subscribed and sworn to before me this 16 day of February, 1924.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern Dis-
trict of California.

On reading and filing the annexed affidavit of H. W. Hutton made on behalf of the libelants, and

good cause appearing therefrom, it is hereby ordered, that libelants be, and they are hereby, allowed to prosecute their appeal in the above cause without furnishing bonds or prepayment of or making deposit to secure fees or costs.

Dated February 16th, 1924.

[Seal] JOHN S. PARTRIDGE,
Judge.

[Endorsed]: Filed Feb. 16, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[53]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO APOSTLES ON APPEAL.

I, Walter B Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case entitled William O'Hara et al. vs. Luckenbach Steamship Company, No. 17,709, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctor for libelants and appellants herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of nineteen dollars and fifty-five cents (\$19.55), but the same has not been paid to me owing to the

52 *William O'Hara and Sven Tjersland*

fact that libelants have secured an order permitting them to prosecute their appeal without payment of costs.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of February, A. D. 1924.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [54]

[Endorsed]: No. 4205. United States Circuit Court of Appeals for the Ninth Circuit. William O'Hara and Sven Tjersland, Appellants, vs. Luckenbach Steamship Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed February 27, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the District Court of the United States in and for the Northern District of California, Third Division.

IN ADMIRALTY—No. 17,709.

WILLIAM O'HARA and SVEN TJERSLAND,
Libelants and Appellants,
vs.

LUCKENBACH STEAMSHIP COMPANY,
Defendant.

ORDER EXTENDING TIME THIRTY DAYS
TO FILE APOSTLES ON APPEAL.

Good cause appearing therefor, it is hereby ordered that the libelants and appellants above named have and they are hereby given thirty days' additional time from and after the 14th day of February, 1924, in which to file their apostles on their appeal in the above cause, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

And it appearing that said libelants and appellants inadvertently permitted the 30 days for the above purpose given by the rules of said Circuit Court of Appeals to lapse by one day without such filing of said apostles on appeal, it is ordered that this order be and the same is an order *nunc pro tunc* as of the 14th day of February, 1924.

Dated February 15th, 1924.

FRANK H. RUDKIN,
Judge.

54 *William O'Hara and Sven Tjersland*

[Endorsed]: No. 17,709. In the Southern Division of the United States District Court, Northern District of California, Third Division. In Admiralty. William O'Hara et al., Libelants and Appellants, vs. Luckenbach Steamship Company, Defendant and Appellee. Order Extending Time to File Apostles on Appeal. Filed Feb. 15, 1924. F. D. Monckton, Clerk. Refiled Feb. 28, 1924. F. D. Monckton, Clerk.

No. 4205. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including —, 192 —, to File Record and Docket Cause.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

WILLIAM O'HARA et al.,
Libelants and Appellants,
vs.

LUCKENBACH STEAMSHIP COMPANY,
Defendant and Appellee.

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED.

1. Print the whole of said record except as follows:
2. Print the title in the first paper, and in all others omit title and print (Title of Court and Cause) in lieu of title.

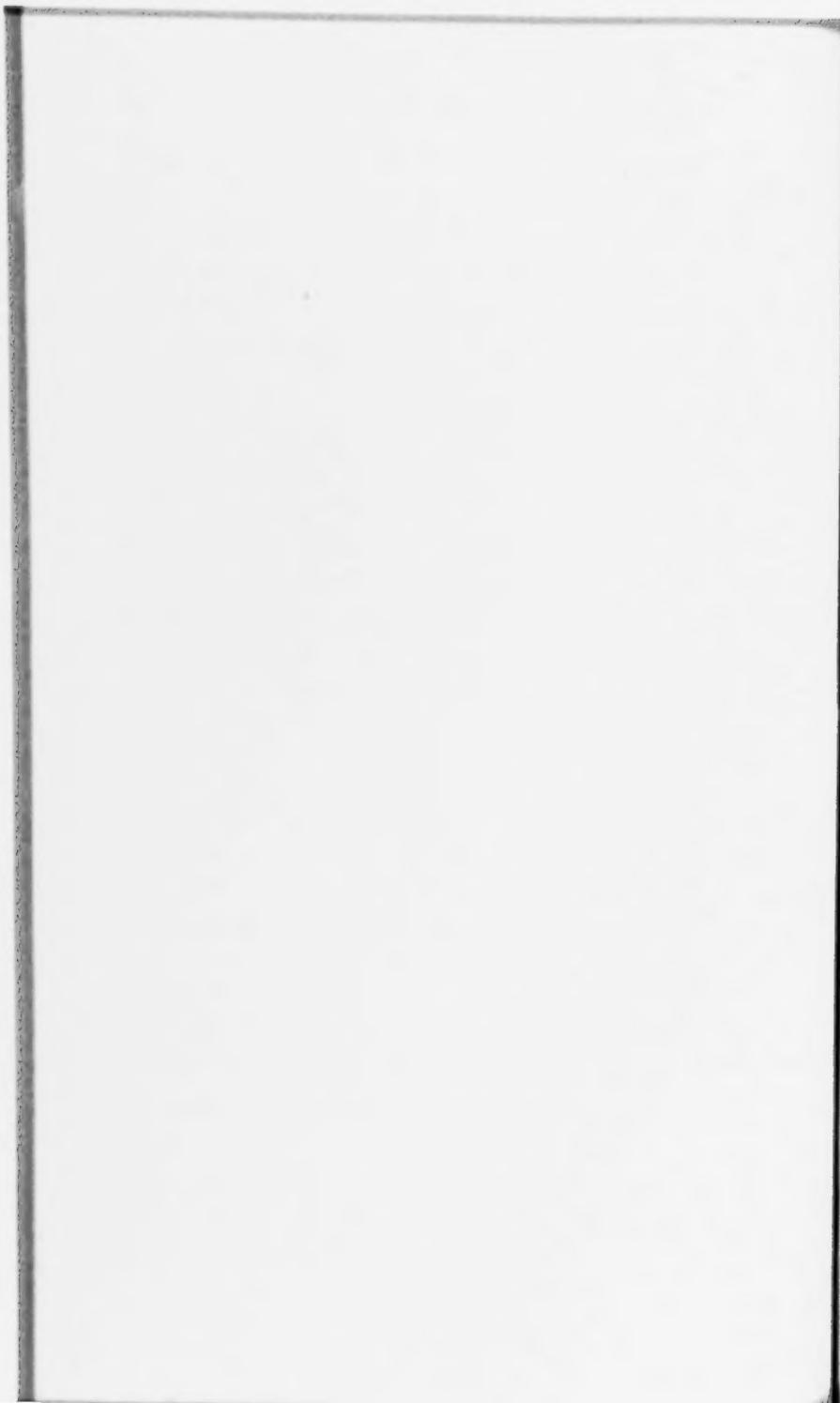
3. Omit printing verifications, but print in place thereof (Duly Verified).
4. Omit printing certificates to deposition.
5. Omit printing designation of apostles filed in lower court.

H. W. HUTTON,
Proctor for Appellant.

Copy received this 5th day of April, 1924.

ANDROS & HENGSTLER,
Proctors for Appellee.

[Endorsed]: No. 4205. In the United States Circuit Court of Appeals for the Ninth Circuit. William O'Hara et al., Appellants, vs. Luckenbach Steamship Company, Appellee. Designation of Parts of Record to be Printed. Filed Apr. 7, 1924.
F. D. Monckton, Clerk.



No. 4205

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

**WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,**

vs.

**LUCKENBACH STEAMSHIP COMPANY, a
Corporation,
Appellee.**

**Upon Appeal from the Southern Division of the United
States District Court for the Northern District
of California, Third Division.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**



At a stated term, to wit, the October Term, A. D. 1923, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the 4th day of June, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 4205.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,

Appellee.

ORDER OF SUBMISSION.

ORDERED above-entitled cause argued by Mr. H. W. Hutton, proctor for the appellants, and by Mr. Frederick W. Dorr, proctor for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1924, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the 13th day of October, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 4205.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,
Appellee.

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF DE-
CREE.

By direction of the Honorable William B. Gilbert, William H. Hunt and William W. Morrow, Circuit Judges, before whom the case was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled case

vs. Luckenbach Steamship Company. 61

be forthwith filed by the Clerk, and that a decree be filed and recorded in the minutes of this court, in accordance with the opinion filed therein.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4205.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,
Appellee.

OPINION U. S. CIRCUIT COURT OF AP-
PEALS.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Third Division.

IN ADMIRALTY: Suit by libellants to recover
from the Luckenbach Steam-
ship Company an alleged
balance of wages.

H. W. HUTTON, Proctor for Libellants.

LOUIS T. HENGSTLER, FREDERICK W.
DORR, Proctors for Appellee.

Before GILBERT, HUNT and MORROW, Circuit
Judges.

MORROW, Circuit Judge.—Appellants (libellants below) were quartermasters employed on September 30, 1922, on the steamship "Lewis Luckenbach" for a voyage from New York to the Pacific Coast ports and return to the Atlantic Coast at a wage of \$45.00 a month.

Appellee (respondent below) is a corporation organized under the laws of Delaware, and is the owner of the steamship "Lewis Luckenbach."

The libellants, in their amended libel, seek to recover of the respondent certain sums for seamen's wages,—William O'Hara and the sum of \$27.50 and Sven Tjersland the sum of \$28.50. The defense is desertion.

The libellants shipped as seamen on the steamship "Lewis Luckenbach" for a voyage from the port of New York to Pacific ports of the United States and return to some port north of Cape Hatteras on the Atlantic Coast at the wages of \$45.00 a month.

Upon the arrival of the vessel in San Francisco on November 15, 1922, libellants asked for a discharge without assigning any reason. The master refused to discharge them because they had signed articles for the return voyage. They then demanded a certificate to the U. S. Marine Hospital, which was given them, but they were unable to secure discharge on account of disability. Libellants then claimed discharge on the ground that the ship was violating the law in not dividing its crew into watches, and demanded payment of their wages. The discharge was again refused. They left the

service of the vessel and brought action to recover wages earned and double pay for each day having elapsed since November 15, 1922, when the wages were demanded.

Section 2 of the Act of March 4, 1915 (38 Stat. 1164) provides as follows:

"That in all merchant vessels in the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and watertenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. * * *

"Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts."

There were thirteen sailors on board the vessel, three of whom were assigned to duty as quartermasters and were divided into three watches. Three were assigned to the lookout in the night-time and were also divided into three watches. The other seven did ordinary shipwork for eight hours during the day, and were off duty during the night.

Libellants, who were quartermasters, do not claim that they were on duty more than one watch out of every three, or that they were required to

work more than eight hours out of every twenty-four. The complaint of these two quartermasters, the libellants herein, is not that they have suffered any unequal treatment in the labor required of them, or that they were not on duty successively, but that other members of the crew did not stand the regular wheel or lookout watch; that they were on duty only eight hours during the daytime and off during the night. No complaint is made of unequal treatment by the other men who were not engaged in the actual sailing or management of the vessel, but were employed in painting and other ordinary shipwork during the day and were allowed off duty during the night. The complaint is that because these other men engaged in ordinary service were not divided into equal watches and required to do duty in watches at night, the two quartermasters claim they had the right to be discharged.

The Court below held that the primary object of the statute was to fix the hours of service and to prevent overwork, not to prescribe the number of seamen on each watch, and that the libellants were, therefore, not entitled to their discharge.

The duty of the quartermaster is to steer the ship, and obviously only one man at a time can be engaged in that duty. The addition of more men to a night watch would not relieve the quartermasters of their duties. They are selected for their qualification to steer the ship, and the safety of the ship often depends upon their qualification to perform that duty. The purpose of Congress was ob-

viously to provide for the safety of the ship in the selection of qualified quartermasters and men for the lookout, and also to prevent overwork. The division of the men into watches as disclosed by the evidence in this case was not contrary to the statute.

The decree of the District Court is affirmed.

[Endorsed]: Filed October 13, 1924. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4205.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,
Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Third Division.

This cause came on to be heard on the transcript of the record from the Southern Division of the District Court of the United States for the Northern District of California, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed Oct. 13, 1924. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1924, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the 12th day of November, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4205.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,

Appellee.

ORDER STAYING MANDATE.

Upon oral motion of Mr. H. W. Hutton, proctor for the appellants, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed until the petition to be made on behalf of the appellants to the Supreme Court of the United States for the issuance of a writ of certiorari herein be disposed of, on condition that the said petition be docketed in the said Supreme Court within thirty (30) days from and after November 13, 1924.

United States Circuit Court of Appeals for the
Ninth Circuit.

WILLIAM O'HARA and SVEN TJERSLAND,
Appellants,

vs.

LUCKENBACH STEAMSHIP COMPANY, a
Corporation,

Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT
COURT OF APPEALS TO RECORD CER-
TIFIED UNDER SECTION 3 OF RULE 37
OF THE RULES OF THE SUPREME
COURT OF THE UNITED STATES.

I, Frank D. Monekton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-seven '(67) pages, numbered from and including 1 to and including 67, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of proctor for the appellants, and certified under Section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Franciseo, in the

vs. Luckenbach Steamship Company. 69

State of California, this 17th day of November,
A. D. 1924.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court
of Appeals for the Ninth Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed Jan. 12, 1925

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Ninth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(5935)